

CIVIL REVISION APPLICATION No 1779 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

=====

1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements? -
2. To be referred to the Reporter or not? Yes. :
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement? -
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? -
5. Whether it is to be circulated to the Civil Judge? : NO  
-

-----  
SARJUBHAI KANTILAL PATEL

Versus

BHIKHUBHAI MAGANBHAI PATEL  
-----

Appearance:

MR YM THAKKAR for MR YN OZA SR. COUNSEL for Petitioners  
MR AJ SHASTRI for Respondent No. 1  
RULE SERVED BY DS for Respondent No. 3, 4, 5, 6, 7, 8,  
9

-----  
CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 28/06/2000

ORAL JUDGEMENT

The petitioner - plaintiff filed Special Civil  
Suit No. 248/99 in the Court of Civil Judge (SD), Surat  
for specific performance of the agreement wherein nine  
persons have been impleaded as defendants including the  
defendants no. 1 and 2 who are husband and wife and the

defendants no. 3 and 4 are minor children of the respondents no. 1 and 2. They are impleaded as defendants no. 3 and 4 through their natural guardian and next friend of their father no. 1.

2. The defendants moved an application exh. 24 before the trial Court with the prayer that the plaint may be rejected under the provisions of Order VII Rule 11 (d) of the Civil Procedure Code ("CPC" for short) for the breach of mandatory provisions of Order 32 Rule 3 (4) of the CPC. The trial Court vide the impugned order dated 26-11-1999 allowed that application and the plaintiffs' suit was rejected on the ground that no guardian has been appointed for the respondents no. 3 and 4 by the Court. It is mandatory duty of the Court to appoint the guardian for proper representation of the minor in the suit. This order has been challenged in the present revision application in the revisional jurisdiction u/s 115 of the CPC.

3. Heard learned counsel for the parties and perused the relevant record of this case.

4. learned counsel for the petitioner submitted that the plaint has been rejected by the trial Court as no guardian or next friend has been appointed by the Court under Order 32 Rule 3 (4) of the CPC. It is the contention of the learned counsel for the petitioner that the provisions of Order 32 Rule 3 (4) of the CPC are general provisions of law and they are not attracted in the present case as specific provisions have been made by the Statute in Section 19 of the Guardians and Wards Act, 1890, which reads as under :

"19 - Guardian not to be appointed by the Court  
in certain cases :- Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person -

(a) of a minor who is a married female and  
whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) of a minor whose father is living and is  
not, in the opinion of the Court, unfit to be guardian of the person of the matter, or

(c) of a minor whose property is under the

superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

5. Under the provisions of Section 19 of the Guardians and Wards Act, 1890, wherein a minor whose father is living and is not in the opinion of the Court unfit to be appointed as guardian of a person of the minor, the Court is not required to appoint a guardian or next friend of the person of the minor. Order 32 Rule 3 (4) of the CPC are the general provisions of law, wherein the defendant is minor, the Court on being satisfied with the fact of his minority shall appoint a proper person to be a guardian for the suit in such manner, and that such order can be passed on the application in the name and on behalf of the minor or by the plaintiff. Rule 4 of Order 32 of the CPC requires that who may act as next friend or be appointed guardian for the suit for the suit. Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit; provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of next friend, a defendant, or, in case of a guardian for the suit, a plaintiff. No person without his consent be appointed as guardian for the suit. Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, or out of the property of the minor, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require. It is also pointed out that the Court can appoint a guardian of a minor under the provisions of O. 32 R. 3 of the CPC, if the Court finds adverse interest of the parents who are parties to the suit. The observations of the trial Court is erroneous that it is the duty of the plaintiff to move such application for appointment of the guardian of a minor defendant. In the present case, it is mentioned that in the array of the parties that minor is to be represented through the guardian and next friend, through his father as a guardian and next friend both, the minors have been represented through their father, the defendant no. 1 and has filed Vakalatnama on behalf of the minors and there is no allegation that the parents who are impleaded as the defendants in the suit have any adverse interest against the minor defendants and there is no allegation that the parents are unable to represent their minor

children who are impleaded as the defendants no. 3 and 4 in the suit. The trial Court erred in holding that the suit is barred by the law under Order VII Rule 11 (d) of the CPC. In support of his contention, learned counsel for the petitioner relied on the decision of Rajasthan High Court in the case of Anandram and another Vs. Madholal and others, reported in AIR 1960 RAJASTHAN 189, wherein it has been held that the Courts must strictly observe the provisions of O. 32 Rs. 3 and 4 CPC but at the same time the real object of the said rules is to safeguard the interests of the minor and in a case like the present nowhere the minor is effectively represented by his own natural guardian and father and where his interest does not conflict with that of guardian and where no particular prejudice is alleged, it would not be proper for the court to set aside the decree in exercise of its inherent power, simply because a formal order regarding the appointment of a guardian ad litem is not made by the court on account of inadvertence.

6. Learned counsel for the petitioner has also relied on decision of this Court in the case of Patel Meghjibhai Vithalbhai V. Khetivadi Utpan Bazar Samiti, Upleta, reported in 1995 (2) G.L.R. 1497, wherein it has been held that the respondent could not have and ought not to have made any application under O. 7 Rule 11 (d) of the Code for rejection of the plaint for want of the required statutory notice under Sec. 58 of the Act. Such an application on the part of the respondent herein was misconceived.

7. Learned counsel for the petitioner also relied on the decision of this Court in the case of (Smt) Lilaben Ramniklal and Others Vs. Vithaldas Tulsidas and Others, reported in 1980 G.L.H. 951, wherein it has been held that it is considered that the question is whether because of this want of formality of appointing the mother, the natural guardian, as a guardian ad litem, the decree stands vitiated or not. This is a sheer formal or technical lacuna which does not vitiate the solemn judgment and the decree. In the case on hand there was a registered document executed by the predecessor-in-title of these minors. The mother had engaged an advocate not only for herself but specifically for her minor children also. She had filed the written statement also even on their behalf. The mortgage being a registered one and executed by the deceased's predecessor-in-title there was not anything that could be challenged by the minors. No prejudice whatsoever could have been conceivably caused to the minors.

8. As such, the contention of the learned counsel for the petitioner is that the provisions of O. 32 R. 3 (4) of the CPC are not mandatory and it is not obligation on the part of the Court to appoint a guardian for a minor defendant where the minor is being properly represented by his natural guardian parents, father or mother, particularly there is no allegation of adverse interest or the interest of the minor child would be jeopardized for any cause and secondly where specific law has been provided for a particular action the general law will not be applicable and the specific provision in that regard would be attracted in that respect and will prevail over general law. The provision of C.P.C. regarding appointment of guardian of minor are of general law while the provisions of Guardians & Wards Act are special provisions for appointment of guardian of a minor in a suit proceedings.

9. On the contrary learned counsel for the respondents submitted that whenever the Court finds that any party is a minor it is the prime duty of the Court to appoint a proper person as a guardian under O. 32 Rule 3 (4) of the CPC and the Court is required to see the proper representation of the minor and the Court must be satisfied that the interest of the minor is being properly represented by any guardian. He relied on the decision of the Bombay High Court in the case of Diwalibai Damjibhai Bhatti and others Vs. Jaikumar Gopaldas Jail and others, reported in AIR 1969 Bombay 393, wherein it has been held that judicial procedure does not contemplate proceedings against a minor litigant without securing his proper representation before the Court. If a guardian of a minor neglects the minor's interest by failure to appear, normally in Civil Court a guardian is required to be appointed for the purpose of the litigation by the Court under O. 32 R. 3 of the CPC.

10. He has relied on the decision of Madras High Court in the case of Kumara Kangaya Goundar Vs. Arumugha Goundar and others, reported in AIR 1970 Madras, 179, wherein it has been held that if a guardian ad litem has been appointed for a minor defendant and the minor's interests have been duly looked after in the litigation, mere irregularities in the appointment of the guardian cannot render the decree nugatory against the minor. The minor to avoid the decree must further prove that he was not effectively represented in the suit and that he was prejudiced by the failure of the guardian to take pleas that could have been validly raised on his behalf.

11 The learned counsel for the respondent has also relied on another decision of the Punjab and Haryana High Court in the case of Gurpreet Singh Vs. Chatterbhuj Goel, reported in AIR 1992 Punjab and Haryana 95, wherein it has been held that noncompliance with the mandatory provisions of Order 32 Rule 3 & 4 of the CPC makes the decree void and in the suit against minor for specific performance of agreement to sell, the application was not made under Rule 3 and 4 of the C.P.C. for appointment of a guardian by the plaintiff - person acting on behalf of minor acts is without authority and prejudice must also be presumed to have caused to the appellant. The findings of the learned single Judge of High Court on this point was reversed.

12. Learned counsel for the respondent has further relied on the decision of Allahabad High Court in the case of Maikoo Vs. Uma Shankar Bajpai, reported in AIR 1978 Allahabad 551, wherein it has been held that it is the duty of the court to ensure that a proper person is appointed as a guardian for a person of unsound mind who may be a party to a cause before it. It is to ensure the appointment of a proper person as guardian for an insane person that the procedure prescribed under O. 32 of Civil P.C. for such appointment is to be strictly followed by the Court.

13. He has also relied in the case of Ram Chandra Arya vs. Man Singh and Another, reported in AIR 1968 SC 954, wherein it has been held that the decree against lunatic without appointment of guardian is nullity and sale held in execution of that decree is void ab initio.

14. Learned counsel for the respondent has next relied on the case of Ramchandrar Singh and another Vs. B. Gopi Krishna Dass and others, reported in AIR 1957 Patna, 260, wherein it has been held that one of the elementary rules of natural justice is that no decree, or order finally deciding a question between the parties should be made absolute ex parte without previous notice to the party affected by it. A party has a right to appear and plead his case on all occasions when that case comes on for hearing, and a party should not be deprived of that right. If, therefore, a minor is not effectively represented in a suit, or in an execution proceedings, such defect is not one of mere form, but of substance and, goes to the root of the jurisdiction of the Court, and therefore such minor in the eye of law is not a party to such a suit, or an execution proceedings, and as such, no order passed, or decree made against him in such a suit, and no proceeding taken, or sale held in execution

proceedings against him *ex parte* in the absence will bind him or his estate at all. It was considered in that case in order to determine whether the provisions of Order 32 Rule 3 and 4 of the CPC are mandatory or directory, it is true that the use of word "shall" does not conclude the matter, and, thereafter universal rule to aid to determine whether mandatory enactment shall be considered directly only or obligatory with an implied nullification for disobedience. It is therefore the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed. Order 32 of the CPC has been enacted to protect the interest of the minor and to see that they are represented in the suit or execution proceedings by a person who is qualified to act as such.

15. In the case of *Ramchandra Pd. Singh and other Vs. Rampunit Singh and others*, reported in AIR 1968 Patna 12, it has been held that the provisions of Order 32 Rule 3 (4) of the CPC are mandatory. Notices to the proposed guardian and to minor when not served, appointment of guardian-adlitem of minor is without jurisdiction and since minor is not properly a party to proceedings.

16. I have considered carefully the contentions of the learned counsel for the parties and perused the material on the record of this case.

17. First of all, we have to see whether the Court is under obligation to appoint a guardian / next friend under Order 32 Rule 3 of the CPC as Sub-rule (1) of Rule 3 of Order 32 provides that where the defendant is minor the Court on being satisfied of the fact of his minority shall appoint a proper person to be guardian for the suit for such minor. It has also to be seen whether the word "shall" gives mandate to the Court to appoint a guardian of a minor. For this purpose, we have to read the provisions of Sub-rule 4 of Rule 3 of Order 32 and Rule 3A of Order 32 of the CPC which have come into existence by amendment in 1976. Sub-rule 4 of Rule 3 of Order 32 of the CPC reads as under :-

"3(4) No order shall be made on any application under this rule except upon notice and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or there is no father, to the mother, or where there is no father or mother, to other natural guardian of the minor, or where there is

no father, mother or other natural guardian, to the person in whose care the minor is and after hearing any objection which may be urged on behalf of any person served with notice under this Rule.

3(4A) (1) The Court may in any case, if it thinks fit issue notices under Sub rule (4) to the minor also.

3A(1) No decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject matter of the suit adverse to that of the minor but the fact that by reason of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interest of the minor, shall be a ground for setting aside the decree.

(2) Nothing in this rule shall preclude the minor from obtaining any relief available under any law by reason of the misconduct or gross negligence on the part of the next friend or guardian for the suit resulting prejudice to the interest of the minor.

18. On the basis of the statutory provisions of Rule 3A of Order 32 of the CPC, it is evident that even the next friend or guardian of a minor has adverse interest, it would not be sufficient ground for setting aside the decree passed against a minor unless it is established that prejudice has been caused to the interest of the minor by adverse interest of the guardian or next friend of the minor. It is also mandatory requirement that notice to father or mother or natural guardian or any person under whose care the minor is and minor has to be issued and served with a notice and a reasonable opportunity of hearing of any objection if raised has been provided. Thus, where a minor is properly represented by his/her father or mother or natural guardian, it is not necessary at all in all cases that guardian or next friend should be appointed by the Court. The Court is required to see that the interest of the minor is properly represented through his/her parents or guardian in the suit. On the basis of the discussion, I am constrained to hold that the word "shall" referred in Sub-rule (1) of Rule (3) of Order 32 of the CPC is only directory and not mandatory. But where minor is not properly represented by his father, mother, natural guardian or father or mother natural guardian who has



adverse interest in the subject matter of the suit to the interest of the minor and there is likelihood of cause or interest of the minor is jeopardized or prejudiced then the word "shall" referred in Sub-rule 3 of Rule (1) of Order 32 of the CPC is mandatory then the Court is under obligation to appoint his guardian or next friend under the procedure prescribed therefor.

19. In the present case, there is no allegation by the parents of the minors that their interest is adverse to the interest or the cause of the minors is father and mother are also parties in the suit, they have engaged counsel on behalf of themselves and on behalf of the minors and Vakalatnama on behalf of the minors and their parents has been filed and the minors are being properly represented in the suit.

20. In the present case, the trial Court has not recorded any finding that the interest of the minor defendants is not being properly represented by their parents and there is likelihood of prejudice to the cause of the minors. In absence of any finding or material on record it cannot be said that the minor children are not being properly represented by their parents. As such, the provisions O. 32 R. 3 (4) would be directory and not mandatory. Even the Court is required to satisfy itself that the minors' interest is being properly represented or not. The trial Court has not given any finding to that effect. Merely on the ground that the Court has not appointed any guardian or next friend of the minors defendant, it would not be sufficient to reject the plaint. At the most the Court if at any impression that the minors were not being properly represented by their parents, the Court could have required the parties to move any application for appointment of their guardian and to lead evidence in this respect that there is likelihood of prejudice of the interest of the minors and in the facts and circumstances of the case, if the Court finds that proper representation of the minor defendants has not been made in the suit then the Court could have appointed guardian or next friend of the minor defendants under the provisions of law.

21. In the present case, the Court below has committed manifest error in holding that the appointment of guardian of a minor is necessary and exceeded its jurisdiction rejecting the plaintiff's plaint and allowing the application exh. 24 of the defendants where there is no allegation that the interest of the minor defendants was not being properly represented by the

defendants no. 1 and 2 and their interest can be prejudiced by nonappointment of guardian. In the present case, the trial Court exceeded its jurisdiction in rejecting the plaintiff's suit and allowing the defendants' application exh. 24. Secondly, it is a well settled rule of law where the special provisions have been provided by the Statute, those provisions will prevail over the general provisions made for the same purpose. In the present case, specific provisions have been provided under Section 19 of the Guardians and Wards Act, 1890, wherein the plaintiff is not required to move an application for appointment of a minor defendant where interest of minor is properly presented by his own parents, father and mother and they have also engaged their advocate and they have filed their vakalatnama. As such, this revision application is liable to be allowed and the impugned judgment and order passed by the Civil Court (SD), Surat deserves to be set aside.

22. Accordingly, this Civil Revision Application is allowed and the impugned judgment and order dated 26-11-1999 passed by the Civil Judge (SD), Rajkot on the application exh. 24 in Spl. Civil Suit No. 248/99 is hereby quashed and set aside.

23. The trial Court is directed to proceed with expeditiously and decide the aforesaid suit as far as possible within a period of four months in accordance with law from the date of production of a certified copy of this order by either of the parties. Rule is made absolute to the aforesaid extent, with no order as to costs. Interim order stands vacated. D. S. is permitted.

-0-0-0-0-0-

/JVSatwara/